

FAMILY LAW SECTION

September 29, 2011

TO: Members, Assembly Committee on Judiciary and Ethics

FR: Attorney Anthony Menting, Chair-elect
Family Law Section

RE: Assembly Bill 235 relating to: approving premarital agreements

The State Bar of Wisconsin Family Law Section opposes 2011 Assembly Bill 235. The Section believes that AB 235 is contrary to the best interests of Wisconsin's families and taxpayers.

Parties may enter agreements before marriage which address the division of property and the award of maintenance in the event of divorce. Under current law, the property division terms "shall be binding" on the parties unless the terms are "inequitable." The trial court shall "presume" that the division of property set forth in a premarital agreement is "equitable." See WI stat. sec. 767.613(l).

Under current law the maintenance provisions contained within a premarital agreement are not presumed to be binding on the trial court. The terms of the premarital agreement must be considered by the court when setting the appropriate amount and duration of maintenance. However, the maintenance provisions set forth in the parties' premarital agreement constitute only one of ten factors which must be reviewed by the court. See WI Stat sec. 767.56.

2011 Assembly Bill 235 seeks to strip courts of any authority to review the circumstances surrounding formation and enforcement of marital property agreements as to property division and maintenance.

Marital Partnership. Marriage is partnership consisting of a husband, wife and oftentimes children. Society is a silent partner, as society benefits socially and economically from marriage. The societal impact is significant.

In many marriages one party is the primary breadwinner and financial provider for the family. The other parent may remain home with the children full or part-time. Such parents' sacrifices for the marriage permit the marriage and society to benefit. AB 235 diminishes non-financial contributions to the marital partnership. The Family Law Section opposes bills which diminish non-financial contributions to families.

Harmful to Children and Families. The Family Law Section believes that AB 235 is harmful to children and families. With the passage of this bill the financially disadvantaged spouse must consider the future more than ever. Since the spouse could be left with limited resources, the spouse will need to work and accumulate wealth and work-related experience rather than care for children, home or the other spouse. The Family Law Section opposes bills which promote finances over the well-being of children and families.



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Harmful to Women. Women disproportionately care for children and aging parents. In many marriages the husband will accumulate experience, seniority, retirement accounts, business interests, etc., while the wife is caring for their children or parents. While some men will suffer financially as a result of this Bill, women will be disproportionally harmed by this bill. The Family Law Section opposes bills which diminish the role of women in families.

Impediment to Marriage. It is well-known and understood that children and society benefit from marriages. AB 235 is an impediment to marriage. A spouse that could be left with little to no financial reward may not marry. The Family Law Section opposes bills which create a financial barrier to marriage.

Excess Taxes and Costs. Under the bill one party to the marital partnership may accumulate wealth and income while the other party cared for the home, children and financial provider. Under the bill the financial provider could receive the marital estate and income upon divorce, leaving the other spouse with limited financial resources. The impoverished spouse will eventually require taxpayer-assisted health insurance, healthcare, housing, food and other assistance. The Family Law Section believes that both parties should benefit economically from the marital partnership, and that such an arrangement will result in savings for all taxpayers. AB 235 increases governmental costs and taxes.

Inflexibility. By requiring courts to simply rubber-stamp premarital agreements regardless of the circumstances, AB 235 removes any element of court review for an agreement for any reason. Under current law, for example, courts can determine whether one party was threatened or under duress before signing the agreement. Victims of even substantiated domestic violence would have no recourse for relief. Indeed, under AB 235, even an agreement signed under threat of death would be enforceable.

Similarly, AB 235 removes any element of fairness for unusual or unexpected circumstances. Imagine parties with relatively equal incomes signing away any right to request maintenance, and five years later one party quits his or her career to care for the elderly parents of the party who still works outside the home. Imagine further that this situation continues for 20 years before the elderly parents die and the working spouse files for a divorce. One party will have total access to income, retirement, and property, and the other will be left in his or her 60's, with nothing. Under current law, courts can consider whether it is reasonable to deny maintenance to the person who has sacrificed his or her career and income prospects in situations such as this.

Applicability. AB 235 proposes substantial changes to the current statutes and cases which interpret them. The bill's effective date is troublesome, as it does not take into consideration its impact on premarital agreements which were negotiated and executed previously. Since the bill substantially changes the law, it interferes with previously executed contracts under current law and will lead to significant unintended results. If this bill should pass, it must be limited to premarital agreements entered following passage.

In summary, the Family Law Section believes that AB 235 should not be passed. The Section does not believe that financial barriers will benefit society or Wisconsin's families. The Section believes that the current law properly addresses the treatment of premarital agreements in the event of divorce.

The State Bar of Wisconsin establishes and maintains sections for carrying on the work of the association, each within its proper field of study defined in its bylaws. Each section consists of members who voluntarily enroll in the section because of a special interest in the particular field of law to which the section is dedicated. Section positions are taken on behalf of the section only.

The views expressed on this issue have not been approved by the Board of Governors of the State Bar of Wisconsin and are not the views of the State Bar as a whole. These views are those of the Section alone.

If you have questions about this memorandum, please contact Sandy Lonergan, Government Relations Coordinator, at slonergan@wisbar.org or (608) 250-6045.